1836, it had no standing in a court of justice. So this court has uniformly held. Les Bois *v.* Brommell, 4 Howard.

In the next place, the United States reserved the power to survey and grant claims to lands in the situation that these contending claims were when confirmed; nor have the courts of justice any authority to disregard surveys and patents, when dealing with them in actions of ejectment. This court so held in the case of West *v.* Cochran, and will not repeat here what is there said.

When the survey of 1817 for Dissonet's land was recognised at the surveyor general's office as properly executed, which was certainly as early as 1823, then Dissonet had a title that he could enforce by the laws of Missouri, and which was the elder and better; it being settled that where there are two confirmations for the same land, the elder must hold it. A more prominent instance to this effect could hardly occur, than that of rejecting the younger confirmation in the case of Les Bois *v.* Brommell, above cited.

The act of 1811, reserving lands from sale which had been claimed before a board of commissioners, has no application to such a case as this one. It was so declared in the case of Menard *v.* Massey, 8 Howard, 309, 310.

It is ordered, that the judgment of the Circuit Court be reversed, and a venire de novo awarded.

ROBERT J. VANDEWATER, APPELLANT, *v.* EDWARD MILLS, CLAIMANT OF THE STEAMSHIP YANKEE BLADE, HER TACKLE, &C.

Maritime liens are *stricti juris*, and will not be extended by construction.

Contracts for the future employment of a vessel do not, by the maritime law, hypothecate the vessel.

The obligation between ship and cargo is mutual and reciprocal, and does not take place till the cargo is on board.

An agreement between owners of vessels to form a line for carrying passengers and freight between New York and San Francisco, is but a contract for a limited partnership, and the remedy for a breach of it is in the common-law courts.

THIS was an appeal from the Circuit Court of the United States for the district of California.

It was a libel, filed originally in the District Court, by Vandewater, against the steamer Yankee Blade, for a violation of the following agreement:

"This agreement, made this twenty-fourth day of September, 1853, at the city of New York, between Edward Mills, as agent for owners of steamship Uncle Sam, and William H.

Brown, as agent for the owners of steamship America, witnesseth, that said Mills and Brown hereby agree with each other, as agents for the owners of said ships before named, to run the two ships in connection for one voyage, on terms as follows, viz:

"Of all moneys received from passengers, and for freight contracted through, between New York and San Francisco, both ways, the Uncle Sam shall receive seventy-five per cent., and the America shall receive twenty-five per cent. The money to be received here, by said E. Mills, and the share of the America to be paid over to William H. Brown, or to his order, (before the sailing of the ship,) and the share due the America, of moneys received on the Pacific side, to be paid over to said Brown, or to his order, immediately on the arrival of the passengers in New York, by E. Mills, who guaranties, as agent aforesaid, the true and honest return of all funds received by his agents on the Pacific. It is understood that this trip is to be made by the Uncle Sam, leaving San Francisco on or about the 15th of October, and the America leaving New York on or about the 20th of October next.

"Each ship is to pay all expenses of her running and outfits, and to be responsible for her own acts in every respect. Each ship is to retain all the money received for local freight or passengers; that is, for such freight and passengers as only pay to the ports the individual ship runs to, without any division with the other ship.

"No commissions are to be charged anywhere on any receipts for the America, by said Mills, in division, but the expense of advertising and the amount paid out for runners, at all points, are to be borne by each ship in the same proportion as receipts are divided between them.

"In consideration of all the above well and truly performed in good faith, Edward Mills, as agent for the steamship Yankee Blade, hereby agrees, that when the America arrives at Panama, on her voyage hence for the Pacific ocean, said ship Yankee Blade shall leave New York at such time as to connect with the America, conveying passengers and freight on the same terms as is hereinbefore agreed, (say 25 per cent. to the Yankee Blade, and 75 per cent. to the America.) Provided, only, that said connection shall be made at a time that will not prevent the Yankee Blade from making her connection with the Uncle Sam, at her regular time."

After the usual preliminary proceedings in cases of libel, the proctors for the claimant filed the following exceptions:

The exceptions of Edward Mills, claimant and sole owner of the steamship Yankee Blade, to the libel of Robert J. Van-

dewater, libellant, allege that the said libel is insufficient, as follows:

First Exception.—That, on the face of said libel, it appears that the alleged cause or causes of action therein set forth, are not within the admiralty and maritime jurisdiction of this honorable court.

Second Exception.—There is no cause of action set forth in said libel, whereby the said steamship Yankee Blade can be proceeded against *in rem* in this honorable court.

Third Exception.—On the face of said libel, it appears the libellant is not entitled to the relief therein prayed for, nor to any decree against the said steamship.

And, therefore, the said claimant prays that the said libel may be dismissed with costs.

In June, 1855, the district judge sustained the exceptions, and dismissed the libel, whereupon the libellant appealed to the Circuit Court.

In September, the Circuit Court affirmed the decree, and the libellant brought the case up to this court.

It was argued by *Mr. Cutting* for the appellant, and *Mr. Blair* for the appellee.

Mr. Cutting made the following points:

I. Agreements for carrying passengers and freight on the high seas are maritime contracts, pertaining exclusively to the business of commerce and navigation, and may be enforced specifically against the vessel by courts of admiralty proceeding *in rem.*

No express pledge is necessary in order to create the lien.

The jurisdiction *in rem* for breach of contracts of affreightments, by bills of lading or otherwise, is recognised by numerous cases. The ground of such jurisdiction rests upon the maritime nature and subject-matter of the contract. 6 How. U. S. R., 392.

Contracts to carry passengers are analogous in principle. They are of a maritime nature in their essence and subject-matter; and when entered into with a particular ship, they bind her to the due performance of the service. The Pacific, 1 Blatch. R., 576, and the cases and arguments there presented.

II. This court has recognised and adopted this principle.

1. Maritime torts to passengers may be redressed in the admiralty *in rem*, by reason of the vessel being *bound by the contract.* S. B. New World *v.* King, 16 How. U. S. R., 469.

2. The case of the New Jersey Steam Navigation Company *v.* The Merchants' Bank, 6 How. U. S. R., 392, establishes

that contracts to be executed on the seas are maritime in their nature, and within the admiralty jurisdiction, as well *in personam* as *in rem*. The principle of that case embraces the present.

III. The contract, by Mills, as agent of the owners of the Yankee Blade, to proceed from New York with passengers and freight, to carry them to Panama, and to deliver them to the America, to be carried by her to San Francisco, is for a maritime service, to be performed upon the sea, and within the jurisdiction of the District Court of the United States.

1. The mode or rate of compensation to be paid therefor does not affect the jurisdiction of the court. The action is for a non-performance of the contract—not for an accounting. The circumstance that the amount of damages might, in part, depend upon the number of passengers that would have been carried, is of no consequence.

2. The agreement did not constitute a partnership between the steamers. Neither party had any joint interest in the vessel of the other, or in the voyage; there was no sharing of losses; each ship was to pay her own expenses of running and of outfits, and was responsible for her own acts in every respect.

The agreement to divide gross receipts was merely a mode of ascertaining the compensation to each vessel, for her separate services.

3. Even if the agreement were to be treated as a mutual arrangement between two vessels, for a joint service, to be rendered by them, on the sea—the compensation therefor to be an apportionment between them, of the whole freight and passage money to be earned by both—it would be a maritime contract, over which the admiralty has jurisdiction. 3 How., 568.

4. The contract is not one merely preliminary to a charter-party, but is a complete arrangement, to be treated as a charter-party, containing in itself the substantial provisions of such an instrument—a definite voyage to be performed on one side, and a definite compensation to be paid therefor by the other side. 3 Sum. R., 144, 148, 149.

Each vessel hired the use and employment of the other, for the proposed adventure; each was to receive, as compensation for such hiring, a certain sum, proportioned to the receipts of both vessels, for that trip. The distinctive characteristics of a charter-party are found.

The question of jurisdiction does not depend upon the particular name or character of the instrument, but whether it imports a maritime contract or not. The Tribune, 3 Sum. R., 144, 148.

5. The objection of the Circuit Court, that the contract was made by the owners, at the home port, does not appear to be authorized by any fact established in the case. The allegation of residence in the claim, (p. 8,) was merely formal, and not issuable. It does not appear where the owner or owners of the Yankee Blade resided at the time of the contract, nor what was her home port.

6. But assuming that the Yankee Blade belonged to New York, and that her owners resided there at the time of the contract, the Circuit Court erred in supposing that there could be no lien for that reason. The existence of a lien depends on the nature of the contract; and if that be maritime, and creates a lien, the circumstance that it is executed by the owner in person does not affect it. 1 Valin Ord. de la Mar., 630, Liv. III, Tit. I, Art. II; 2 Boul. Pat. Droit Com., 298; 3 Pardessus Lois Mar., 159; Ib., 281, 427; 2 Boucher Consul., 379, sec. 675; p. 457, sec. 870; 4 Pardessus, p. 40.

Contracts of affreightment and to carry passengers are frequently (and in New York most generally) made by the owners, or their immediate agents, in the home port. When bills of lading are signed in the home port by the owner, the lien of the shippers exists equally, as if the master had signed them.

The following are cases of liens created by contracts made with the owners in the home port: The Pacific, 1 Blatch. R., 576; The Aberfoyle, Ib., 207; Bearse *v.* Pigs Copper, 1 Sto., 314; The Mary, 1 Paine R., 671; The Draco, 2 Sum., 179.

7. The conclusion of the learned circuit judge, that this was a personal agreement between the owners of the two ships, and that a personal credit existed, which excluded the idea of a lien on the vessels, is not authorized by the facts.

The contract describes each of the parties to it, "as agent" of the owners. The "agents" acted as representatives of the vessels; the owners are not named or referred to. The inference is, that a *mere* personal credit was not relied on, to the exclusion of a lien.

Mr. Blair made the following points:

1. That the contract on which this proceeding is founded, is not a maritime contract.

It is an agreement between the owners of two steamships, to run their vessels in combination, in the transportation of freight and passengers, between New York and San Francisco, and to divide the proceeds between them; and also an engagement, by one of the parties who is to receive all the money, to pay over to the other his proportion.

So much of this contract as relates to maritime service is but

preliminary. No maritime service is contracted for, one to the other. Such services are thereafter to be contracted for, and rendered to other persons by both the parties. In such case, there is no jurisdiction. Sheppard *v.* Essex Ins. Co., 3 Mason, 6.

There is no difference in principle in this, from the contract which this court considered in the case of Phœbus *v.* The Orleans, (11 Peters, 175.) The owners of the Orleans had an agreement to combine their means, and, as part owners, to run a single vessel for the public accommodation. Here is a combination, in which different vessels are run for the same purpose. The court would take no account between the owners of the Orleans. Whether one of the parties to the enterprise had failed to contribute his share, was not a subject of admiralty jurisdiction. There is no difference, as affects that question, whether it be alleged, as in the case of the Orleans, that one party had contributed more than the other towards the enterprise, or whether, as in this case, it be alleged that one party refused to contribute at all.

The similitude of the contracts would be obvious, if the claim here were for the earnings of the trip contemplated in the contract. But it is in right of such earnings that this suit is brought, and though no such earnings were received as were contemplated, it is alleged that this is the fault of the other party, and should not prevent an accounting as if they had been actually received.

Consortship, it is true, is treated as a class of maritime contracts by Judge Conkling, pp. 15, 236, 849, of his Admiralty Jurisdiction. But he says the case of Andrews *v.* Wall, 3 Howard, p. 568, is the only reported case relating to it. But the question there was, not whether consortship was a maritime contract, but related to the distribution of salvage among those entitled. The consort contract was incidental only, and was considered merely so far as to see whether it was subsisting at the time of the wreck. The nature of the consideration of the contract was not material.

The case of Cutter *v.* Roe, 7 Howard, 730, also shows that the nature of the consideration will not give character to a contract, or give jurisdiction even *in personam*.

2. But if this be regarded a maritime contract at all, it is certainly only partly so; the object, as between the parties, being to stipulate for the division of the proceeds to accrue to them from their services to others. It therefore falls within the case of Plummer *v.* Webb, 4 Mason, 380, and L'Arena *v.* Manwaring, Bee, 199, in which the court declined jurisdiction, because the whole contract was not of a maritime nature.

3. But the proceeding is *in rem*, and the advocates of the largest measure of admiralty jurisdiction for the district courts admit that they have not jurisdiction to enforce maritime contracts by such proceedings, unless the contract expressly or by implication creates a lien on the ship. The Draco, 2 Sumner, 180.

It is contended that this contract is in the nature of a charter-party, and therefore a lien is implied. See definition of charter-party, Abbott, p. 241.

It is certainly not a contract for the hiring of a ship, or any part of one; nor is it a contract for the transportation of persons or property. The parties to such contracts are carriers on one side, and freighters, charterers, or passengers, on the other. Here is merely an arrangement between carriers, in contemplation of making such contracts, to enable them to co-operate in fulfilling them, and for the division of the proceeds between themselves. No maritime service is rendered to each other. The relations to each other are those of employees of a common employer; and it is expressly stipulated that each is to render to their common employers the service contemplated, at their own cost and risk. The contracting parties are neither of them freighters or passengers, and there is not the remotest analogy upon which to found a claim for the remedies allowed such parties by the maritime law.

But even an express contract of affreightment creates no lien on the vessel till the cargo is shipped. Schooner Freeman *v.* Buckingham, 18 Howard, p. 188.

4. The case of Blaine *v.* Carter, 4 C., 331, shows that the law does not favor implied hypothecations of the ship in obligations executed by the owner in the home port; and this is admitted by Judge Story in the case of the Draco above cited. In the absence of any precedent or established usage creating a lien in like cases, with reference to which the parties could be presumed to have contracted, there ought to be explicit language in the contract itself to create such a lien. It would be mischievous to annex liens by implication to such contracts; there would be nothing to give notice of their existence; they are not accompanied by possession, and so are not lost by being out of possession; and they do not arise from any shipments, supplies, or services, or other transactions which can be seen or known—so there would be no safety to the purchaser of vessels, if liens can be so created.

Mr. Justice GRIER delivered the opinion of the court.

The libel in this case sets forth a contract between the owners of certain steamboats, of which the Yankee Blade was one,

to convey freight and passengers between New York and California. Among other things, it was agreed that the America should proceed to Panama, and the Yankee Blade should leave New York at such time as to connect with the America. The owner of the Yankee Blade refused to employ his vessel according to this agreement, and sent her to the Pacific under a contract with other persons. For this breach of contract the libellant demands damages, assuming that the vessel is subject, under the maritime law, to a lien which may be enforced *in rem* in a court of admiralty.

The Circuit Court dismissed the libel, being of opinion "that the instrument is of a description unknown to the maritime law; that it contains no express hypothecation of the vessel, and the law does not imply one."

In support of his allegation of error in this decree, the learned counsel for the appellant has endeavored to establish the following proposition:

"Agreements for carrying passengers are maritime contracts, pertaining exclusively to the business of commerce and navigation, and consequently may be enforced specifically against the vessel by courts of admiralty proceeding *in rem.*"

Assuming, for the present, the premises of this proposition to be true, let us inquire whether the conclusion is a legitimate consequence therefrom.

The maritime "privilege" or lien is adopted from the civil law, and imports a tacit hypothecation of the subject of it. It is a "*jus in re*," without actual possession or any right of possession. It accompanies the property into the hands of a bona fide purchaser. It can be executed and divested only by a proceeding *in rem*. This sort of proceeding against personal property is unknown to the common law, and is peculiar to the process of courts of admiralty. The foreign and other attachments of property in the State courts, though by analogy loosely termed proceedings *in rem*, are evidently not within the category. But this privilege or lien, though adhering to the vessel, is a secret one; it may operate to the prejudice of general creditors and purchasers without notice; it is therefore "*stricti juris*," and cannot be extended by construction, analogy, or inference. "Analogy," says Pardessus, (Droit Civ., vol. 3, 597,) "cannot afford a decisive argument, because privileges are of *strict right*. They are an exception to the rule by which all creditors have equal rights in the property of their debtor, and an exception should be declared and described in express words; we cannot arrive at it by reasoning from one case to another."

These principles will be found stated, and fully vindicated

by authority, in the cases of The Young Mechanic, 2 Curtis, 404, and Kiersage, Ibid., 421; see also Harmer *v.* Bell, 22 E. L. and E., 62.

Now, it is a doctrine not to be found in any treatise on maritime law, that every contract by the owner or master of a vessel, for the future employment of it, hypothecates the vessel for its performance. This lien or privilege is founded on the rule of maritime law as stated by Cleirac, (597:) "Le batel est obligée à la marchandise et la marchandise au batel." The obligation is mutual and reciprocal. The merchandise is bound or hypothecated to the vessel for freight and charges, (unless released by the covenants of the charter-party,) and the vessel to the cargo. The bill of lading usually sets forth the terms of the contract, and shows the duty assumed by the vessel. Where there is a charter-party, its covenants will define the duties imposed on the ship. Hence it is said, (1 Valin, Ordon. de Mar., b. 3, tit. 1, art. 11,) that "the ship, with her tackle, the freight, and the cargo, are respectively bound (affectée) by the covenants of the charter-party." But this duty of the vessel, to the performance of which the law binds her by hypothecation, is to deliver the cargo at the time and place stipulated in the bill of lading or charter-party, without injury or deterioration. If the cargo be not placed on board, it is not bound to the vessel, and the vessel cannot be in default for the non-delivery, in good order, of goods never received on board. Consequently, if the master or owner refuses to perform his contract, or for any other reason the ship does not receive cargo and depart on her voyage according to contract, the charterer has no privilege or maritime lien on the ship for such breach of the contract by the owners, but must resort to his personal action for damages, as in other cases.

See 2 Boulay, Paty Droit Com. and Mar., 299, where it is said, "Hors ces deux cas, (viz: default in delivery of the goods, or damages for deterioration,) il n'y a pas de privilege à pretendre de la part du marchand chargeur; car si les dommages et intêrets n'ont lieu que pour refus de depart du navire, pour depart tardif ou precipité, pour saisie du navire ou autrement il est evident que a cet egard la créance est simple et ordinaire, sans aucune sorte de privilege."

Thus, in the case of the City of London, (1 W. Robinson, 89,) it was decided that a mariner who had been discharged from a vessel after articles had been signed, might proceed in the admiralty in a suit for wages, the voyage for which he was engaged having been prosecuted; but if the intended voyage be altogether abandoned by the owner, the seaman must seek his remedy at common law by action on the case.

And this court has decided, in the case of The Schooner Freeman *v.* Buckingham, 18 Howard, 188, "that the law creates no lien on a vessel as a security for the performance of a contract to transport cargo, until some lawful contract of affreightment is made, and a cargo shipped under it."

Now, the damages claimed by the libellant, in this case, are not for the non-delivery of merchandise or cargo at the time and place according to the covenants of a charter-party, or for their injury or deterioration on the voyage, but for a refusal of the owners to employ the vessel in carrying passengers and freight from New York, so as to connect with the America when she should arrive at Panama. The owners have not made it a part of their agreement that their respective vessels should be mutually hypothecated as security for the performance of their agreement; and, as we have shown, there is no tacit hypothecation, privilege, or lien, given by the maritime law.

We have examined this case from this point of view, because the libel seems to take it for granted that every breach of contract, where the subject-matter is a ship employed in navigating the ocean, gives a privilege or lien on the vessel for the damages consequent thereon, and because it was assumed in the argument, that if this contract was in the nature of a charter-party, or had some features of a charter-party, the court would extend the maritime lien by analogy or inference, for the sake of giving the libellant this remedy, and sustaining our jurisdiction. But we have shown this conclusion is not a correct inference from the premises, and that this lien, being *stricti juris*, will not be extended by construction. It is, moreover, abundantly evident that this contract has none of the features of a charter-party. A charter-party is defined to be a contract by which an entire ship, or some principal part thereof, is let to a merchant for the conveyance of goods on a determined voyage to one or more places. (Abbott on Ship., 241.)

Now, by this agreement, the libellant has not hired the Yankee Blade, or any portion of the vessel; nor have the master or owners of the ship covenanted to convey any merchandise for the libellant, nor has he agreed to furnish them any. But the agent for the Yankee Blade "agrees that when the America arrives at Panama, the Yankee Blade shall leave New York, conveying passengers and freight," which were afterwards to be received by the America, and transported to San Francisco; and the passage money and freight earned was to be divided between them—25 per cent. to the Yankee Blade, and 75 to the America.

This is nothing more than an agreement for a special and limited partnership in the business of transporting freight and passengers between New York and San Francisco, and the mere fact that the transportation is by sea, and not by land, will not be sufficient to give the court of admiralty jurisdiction of an action for a breach of the contract. It is not one of those to which the peculiar principles or remedies given by the maritime law have any special application, and is the fit subject for the jurisdiction of the common-law courts.

The decree of the Circuit Court is therefore affirmed.

THE UNITED STATES, APPELLANTS, *v.* THE BRIG NEUREA, HER TACKLE, &C., WILLIAM KOHLER, CLAIMANT.

Where a libel for information, praying the condemnation of a vessel for violating the passenger law of the United States, states the offence in the words of the statute, it is sufficient.

THIS was an appeal from the District Court of the United States for the northern district of California.

The case presented a general demurrer to the following libel for information:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA. IN ADMIRALTY.

To the Hon. Ogden Hoffman, Jr., Judge of the District Court of the United States for the Northern District of California:

The libel of Samuel W. Inge, attorney of the United States for the northern district of California, who prosecutes on behalf of the said United States against the brig Neurea, and against all persons intervening for their interest therein, in a cause of forfeiture, alleges and informs as follows:

1. That Richard P. Hammond, Esq., collector of the customs for the district of San Francisco, heretofore, to wit, on the thirty-first day of August, in the year of our Lord eighteen hundred and fifty-four, at the port of San Francisco, and within the northern district of California, on waters that are navigable from the sea by vessels of ten or more tons burden, seized as forfeited to the use of the said United States the said brig Neurea, being the property of some person or persons to the said attorney unknown.

2. That one Kohler, master of the said brig Neurea, which is a vessel owned wholly or in part by a subject or subjects of